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No. 98-1255

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL MARTINEZ-SALAZAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent does not dispute the importance and the recurring nature of the question we have presented: whether a criminal defendant who exhausts his peremptory challenges is entitled to automatic reversal of his conviction if he uses one of those challenges to remove a potential juror whom the district court erroneously failed to remove for cause. Rather, he contends, for four principal reasons, that the Court should not decide that question in this case. Respondent's contentions are without merit.

1. The decision below rests on two clearly expressed holdings: first, that the Due Process Clause was violated here, because respondent exhausted his allotment of peremptory challenges and had to use one of those

challenges to remove a potential juror whom the district court erroneously refused to remove for cause, Pet. App. 13a-14a; and, second, that the "effective denial of [respondent's] right to his full complement of peremptory challenges" "requires automatic reversal," *id.* at 15a, 14a. Respondent argues (Br. in Opp. 8-9), however, that this case does not properly present the issues that the court of appeals actually decided. Rather, respondent claims, the issue presented is a narrower one:

> whether procedural due process is violated when the district court erroneously denies a for-cause challenge forcing the defendant to use a peremptory challenge to cure the error, exhausting all peremptory challenges in the process—*and* where there is unequivocal evidence in the record demonstrating that he would have used the erroneously denied peremptory challenge on a different juror.

Id. at 9. That narrower issue, respondent further argues, does not merit this Court's review. *Id.* at 10-16.

Respondent is mistaken. Nowhere did the court of appeals suggest that its rule of automatic reversal is limited to cases in which the defendant not only exhausted his peremptory challenges but also objected in the trial court to the composition of the jury that was selected. To the contrary, the court of appeals required only that respondent have exhausted his complement of peremptory challenges. Pet. App. 13a. See also *Vansickel* v. *White*, 166 F.3d 953, 956 (9th Cir. 1999) (noting that *Martinez-Salazar* distinguished earlier cases because in those cases the defendant "did not exhaust all of his peremptory challenges and hence his right was not denied or impaired in any way") (internal quotation marks omitted). And by reversing respondent's convictions without addressing the dissent's contention (Pet. App. 16a) that respondent failed to object to the jury that was seated, the court implicitly confirmed that it did not view such an objection as a prerequisite to reversal.

Thus, the issue decided by the court of appeals, and presented by our petition, is whether a criminal defendant who exhausts his peremptory challenges is entitled to automatic reversal of his conviction if he uses one of those challenges to remove a potential juror whom the district court erroneously failed to remove for cause. If the petition is granted to address that issue, respondent can seek to defend the judgment below on the narrower ground that reversal is in any event required in such circumstances where the defendant also objects in the trial court to the composition of the seated jury. But respondent's presentation of that narrower argument does not undercut the need for this Court's review of the broader legal rule actually announced and applied by the court of appeals. That is particularly true because respondent's narrower argument for affirmance is both legally and factually flawed.[1]

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[1] For the reasons stated in the petition (Pet. 8-16), respondent's convictions should be affirmed even if respondent had objected in the trial court to the composition of the seated jury. In any event, respondent made no such objection. Rather, after one of the selected jurors was found to be missing, respondent simply requested that the parties be given additional peremptory challenges to select a replacement juror. 12/7/93 Tr. 124-125. Respondent made that request, moreover, because he hoped that the exercise of additional challenges at that point would result in the seating of a Hispanic juror. *Id.* at 125. But see *Georgia* v. *McCollum*, 505 U.S. 42 (1992) (criminal defendant may not exercise peremptory challenges on the basis of race).

2. Respondent argues (Br. in Opp. 10) that the petition should be denied because the issue presented was not raised in a timely manner before the court of appeals. As we noted in the petition (Pet. 5 n.1), the government did concede in a supplemental brief to the court of appeals that it would violate due process to deprive a defendant of his full allotment of peremptory challenges by requiring him to use a peremptory challenge to remove a juror who should have been removed for cause. In its initial brief in the court of appeals, however, the government argued that respondent's convictions should not be reversed because respondent could not show prejudice meriting reversal. Gov't C.A. Br. 10-11. See also Pet. for Reh'g 6-12 (retracting due process concession and reiterating argument that respondent failed to show prejudice meriting reversal).

More importantly, although this Court normally does not review questions that were *neither* "pressed [n]or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992), the court of appeals squarely passed on the issues raised here: that respondent's due process rights were violated and that such violations require automatic reversal. See Pet. App. 9a n.3 ("independently conclud[ing]" that respondent's due process rights were violated), 14a-15a (adopting rule of automatic reversal without suggesting that the government failed to preserve that issue). Those holdings are therefore properly presented for this Court's review. See, *e.g.*, *Williams*, 504 U.S. at 40-45; *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("Respondents argue that this issue was not raised below. * * * It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is" unsettled and important.) (citations omitted).

3. Respondent contends (Br. in Opp. 14) that there is no square conflict among the courts of appeals, because "no Circuit * * * has squarely held that denial of peremptory challenges requires a harmless-error analysis." Respondent is incorrect. In *United States* v. *Brooks*, 161 F.3d 1240, 1245-1246 (1998), for example, the Tenth Circuit found harmless the precise error at issue here: the erroneous denial of a for-cause challenge, requiring a criminal defendant to use a peremptory challenge to remove the juror in question. See *ibid.* ("Even if the denial of the challenge for cause was error, [an issue the court did not decide,] it was harmless because [the juror in question] was removed by a peremptory challenge. * * * [T]he fact that [the defendant] could have used the peremptory he 'wasted' [to remove] other members of the venire is of no moment."). See also *Getter* v. *Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1122-1123 (10th Cir. 1995) (same in civil case), cert. denied, 516 U.S. 1146 (1996). Respondent's convictions would certainly have been affirmed in the Tenth Circuit.[2]

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[2] Respondent claims (Br. in Opp. 14) that the Tenth Circuit has "failed altogether to address whether a due-process violation" occurs in the circumstances of the present case. To the contrary, the Tenth Circuit expressly held in *Getter* that no due process violation had occurred. 66 F.3d at 1123. See also *Brooks*, 161 F.3d at 1245-1246 (relying on *Getter*). Respondent makes a similar claim about the law of the Second Circuit (Br. in Opp. 14), but he is again mistaken. See *United States* v. *Towne*, 870 F.2d 880, 885 (2d Cir.) (even if district court erred by refusing to excuse potential juror for cause and defendant therefore had to use peremptory challenge to excuse juror, defendant would not be entitled to reversal; "[s]ince [defendant] has in no way established the partiality of the jury that ultimately convicted him, he may not successfully claim deprivation of his sixth amendment or *due process* rights") (emphasis added), cert. denied, 490 U.S. 1101 (1989); *United States* v. *Rubin*, 37 F.3d 49, 54 (2d Cir. 1994) (relying on *Towne*).

Respondent's attempt (Br. in Opp. 14) to distinguish the decisions of the Eighth and Eleventh Circuits also fails. Although those courts may not have mentioned due process, both have categorically held that reversal is not required simply because a defendant exhausts his peremptory challenges and uses one of his challenges to remove a potential juror who should have been excused for cause. See, *e.g.*, *United States* v. *Horsman*, 114 F.3d 822, 825 (8th Cir. 1997) (even if trial court's denial of for-cause challenge required defendant to exercise peremptory challenge that would otherwise have been used to remove another potential juror, that "does not state a ground for reversal"), cert. denied, 522 U.S. 1053 (1998); *United States* v. *Gibson*, 105 F.3d 1229, 1233 (8th Cir. 1997); *United States* v. *Farmer*, 923 F.2d 1557, 1566 (11th Cir. 1991).[3] Respondent's convictions would certainly have been affirmed in those circuits as well.

4. Finally, respondent argues (Br. in Opp. 10-16) that review is unwarranted because the decision of the court of appeals is correct. Given the conflict among the courts of appeals on the important and recurring issue presented, however, review would be warranted even if the ruling below were correct. In any event, respondent's defense of the ruling below is unavailing.

Respondent does not dispute that the right of federal criminal defendants to exercise peremptory challenges

[3] Respondent notes (Br. in Opp. 14) that the district court in *Farmer* had granted extra peremptory challenges to the parties. The court of appeals in *Farmer* noted that fact only in passing, however, see 923 F.2d at 1566 n.18, and did not rely on it at all in holding more broadly that a defendant is not entitled to reversal on the ground that "the district court's failure to strike jurors for cause forced him to 'use up' peremptory strikes." *Id.* at 1566. The holding of *Farmer* thus squarely conflicts with the holding of the court of appeals below.

is created by federal rule, not the Constitution. See Pet. 8-9. Nor does respondent take issue with the principle that the violation of a non-constitutional rule of procedure offends the Due Process Clause only if the violation is so gravely prejudicial as to deny the defendant a fair trial. Pet. 9. It cannot reasonably be said that respondent was denied a fair trial by the error at issue here, which simply required him to use one of his peremptory challenges to remove a potential juror who should have been removed for cause. Pet. 9-12. The court of appeals thus erred in concluding that due process was violated in this case.[4]

The court of appeals also erred by applying a rule of automatic reversal. Pet. 13-16. In arguing in support of a rule of automatic reversal, respondent relies heavily on dicta from this Court's decision in *Swain* v. *Alabama*, 380 U.S. 202 (1965), and on lower-court opinions that in turn rely on that dicta. See Br. in Opp. 11-13, 15. The dicta in *Swain*, however, rests on earlier decisions of this Court that antedate both the enactment of the harmless-error statute and rules and this Court's modern decisions construing those provisions. Pet. 12-

[4] As the Ninth Circuit has since elaborated, its finding of a due process violation in the present case rests on the view that the right to peremptory challenges, although created by federal rule or state law, gives rise to a "liberty interest" protected by the Fifth and Fourteenth Amendments. *Vansickel*, 166 F.3d at 957. The broad view that such non-constitutional rules of criminal procedure create liberty interests the impairment of which necessarily violates the Due Process Clause is in substantial tension with this Court's repeated holdings that violations of state law provide no basis for relief under federal law. See, *e.g.*, *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'") (quoting *Lewis* v. *Jeffers*, 497 U.S. 764, 780 (1990)).

14. This Court should grant review in order to determine the validity of the lower courts' continuing reliance on that language in *Swain*.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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